REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 6 April 2023
Ref. no.:AGJ 2148/23

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

case no. KI14/22

Applicant

Shpresa Gërvalla

Constitutional review of
Judgment Rev. no. 409/2020 of the Supreme Court of Kosovo of 28 October 2021

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërxaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge
Nexhmi Rexhepi, Judge and
Enver Peci, Judge

Applicant

1. The Referral was submitted by Shpresa Gërvalla, represented by authorization by Ymer Bardhi, a lawyer at the Legal Office “Bardhi and Partners”, Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Judgment Rev. no. 409/2020 of 28 October 2021 of the Supreme Court of Kosovo (hereinafter: the Supreme Court).

Subject matter

3. The subject matter is the constitutional review of the challenged decision, whereby it is alleged that there has been a violation of Applicant's fundamental rights and freedoms guaranteed by Articles 3 [Equality Before the Law] and 24 [Equality Before the Law] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 14 (Prohibition of Discrimination) of the European Convention on Human Rights (hereinafter: the ECHR) and Articles 1 and 2 of the International Convention on the Elimination of All Forms of Racial Discrimination, as well as Articles 31 [Right to Fair and Impartial Trial] and 54 [Judicial Protection of Rights] of the Constitution in conjunction with Articles 6 (Right to a fair trial) and 13 (Right to an effective remedy)of the ECHR.

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 (Processing Referrals) and 47 (Individual Requests) of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 (Filing of Referrals and Replies) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 27 January 2022, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 10 February 2022, the President of the Court, by Decision [No. GJR. KSH 14/22], appointed Judge Selvete Gërxaliu-Krasniqi as Judge Rapporteur and the Review Panel, composed of Judges: Gresa Caka-Nimani (presiding), Bajram Ljatifi and Safet Hoxha, members.

7. On 14 February 2022, the Court notified the Applicant of the registration of the Referral. On the same day, the Court notified the Supreme Court and Raiffeisen Bank J.S.C. in the capacity of the opposing party of the registration of the Referral.

8. On 5 December 2022, the Court reviewed the report of Judge Rapporteur and unanimously decided to postpone the consideration of the Referral to the next session following additional supplementations.

9. On 16 December 2022, Judge Enver Peci took the oath before the President of the Republic of Kosovo, thus commencing his term at the Court.

10. On 23 February 2023, the Review Panel reviewed the report of the Judge Rapporteur and by unanimously recommended to the Court the admissibility of the Referral. On the same day, the Court decided: (i) to declare the Referral admissible; (ii) to hold that the Judgment [Rev. no. 409/2020] of the Supreme Court of 28 September 2021 is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 ((Right to a fair trial) of the ECHR; (iii) to declare invalid the Judgment [Rev. no. 409/2020] of the Supreme Court of 28 September 2021; and (iv) to

remand for reconsideration the Judgment [Rev. no. 409/2020] of the Supreme Court of Kosovo of 28 September 2021 in accordance with the Judgment of the Court.

11. In accordance with Rule 61 (Dissenting Opinions) of the Rules of Procedure of the Court, Judge Radomir Laban has prepared a dissenting opinion, which will be published together with this Judgment.

Summary of facts

12. On 18 November 2011, the Applicant sustained bodily injuries while performing her work duties as cashier of the KEK division, Fushë Kosovë branch, as a result of her fall on the stairs of the Raiffeisen Bank building, Fushë Kosovë branch.

13. On an unspecified date, the Applicant filed a claim against Raiffeisen Bank before the Basic Court of Prishtina (hereinafter: the Basic Court), whereby she claimed compensation for the injury sustained at the Raiffeisen Bank building.

14. On an unspecified date, Raiffeisen Bank, in the capacity of the respondent, filed a response to the claim of the Applicant, whereby it motioned the court to reject her claim as unfounded, since the accident to the claimant had not occurred in her workplace.

15. On 4 January 2017, the Basic Court issued the Judgment [C. no. 3134/11] whereby it:

I. Partially granted the claim of the Applicant and obliging Raiffeisen Bank to pay her "*for the injury sustained at the workplace [on 6 February 2012] to the extent of 70% of the liability"* as compensation for the non-material damage the following amounts: 7. 000 Euro as compensation for physical pain experienced; 8,400.00 Euro compensation for the fear inflicted; 2,450.00 Euro compensation for bodily deformity; and 3,500.00 Euro compensation due to the limitation of general life activity;

II. Rejected the claim of the Applicant as unfounded "beyond the amounts ordered as in point one of the enacting clause", respectively rejected her compensation claims in the amount of 12,000.00 Euro for the fear inflicted; the amount of 10,000,000 Euro for physical pain caused; the amount of 3,500.00 Euro for bodily deformity; the amount of 1,500.00 Euro due to the limitation of general life activity; the amount of 1,500.00 Euro for assistance from a third person; the amount of 3,000.00 Euro for fortified food and the amount of 2,000,000 Euro for climate rehabilitation; and

III. Obliged Raiffeisen Bank to pay the Applicant for the granted statement of claim the annual legal interest, starting from [4 January 2017] until full payment, as well as the costs of the proceedings in the amount of 1,750.00 Euro.

16. As a result of the administration of the evidence presented before this Court, the Basic Court concluded that: "*It was not disputed that [the Applicant] was injured on 18.11.2011 during regular working hours on the stairs of the respondent's building, but the liability for the injury was disputed. From the evidence administered, such as the accident at work report dated 22.11.2011, the Court found that on 18.11.2011, while [the Applicant] was performing her duties as a cashier in the District of Prishtina in Fushë Kosovë as an employee under a regular employment relationship at KEK Supply Division in Prishtina, she was injured while going down the external stairs of the Raiffeisen Bank building, Fushë Kosovë branch, where she slipped and fell sustaining injuries. The Court, in order to prove the causes leading to the injury of [the Applicant] at her workplace, considered as material evidence the occupational safety expertise dated 19.07.2015 prepared by the expert [HN]. The occupational safety expert assessed that the construction of the stairs is seen to have been made with standard dimensions,*

but the horizontal surface of the stairs where the footsteps with shoes rest have been slippery, therefore the respondent [Raiffeisen Bank] was obliged to create conditions for safety during the movement of people on the stairs. The respondent [Raiffeisen Bank] failed to make a detailed assessment of the potential hazard during the impact of atmospheric precipitation to take the necessary measures to prevent people from slipping while moving through the stairs. The expert added that every time these atmospheric conditions exist, it is a rule to place entry-exit signs at the facility to increase caution while walking. He concluded that to ensure safety while walking, it is not enough to place a layer of rubber with a specified surface and thickness only on the horizontal part before the entry, but all stairs must be included because in this case [the Applicant] did not slip on the horizontal part of the entry-exit but she slipped while going down the stairs and that the respondent's omissions were that it did not take the necessary measures to prevent people from slipping under the influence of atmospheric precipitation, while the omissions of [the Applicant] are that she was not attentive enough when going down the stairs because while going down the stairs she did not use the handrails on one or the other side for hand holding. Therefore, based on these findings, the expert concluded that the respondent bears primary liability and the claimant bears secondary liability.

17. As a result of the determination of the aforementioned factual situation by the Basic Court, the latter found that the claim of the Applicant related to the liability of Raiffeisen Bank and the obligation to compensate her for the injuries is based on Articles 173 and 174, in conjuction with Article 192, paragraph 1 of the Law on Contracts and Torts. Consequently, the Basic Court found that Raiffeisen Bank, in the capacity of the respondent, is liable for compensating the damage of the Applicant "to the extent of 70%", because from the evidence administered, the Court found that in the present case, there is a shared liability both by the Applicant and [Raiffeisen Bank].

18. On an unspecified date, Raiffeisen Bank filed an appeal to the Court of Appeals against the aforementioned Judgment of the Basic Court, because of violation of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation, and erroneous application of substantive law. The Applicant did not submit a response to Raiffeisen Bank's appeal.

19. On 24 December 2020, the Court of Appeals issued the Judgment [Ac. no. 1034/17] whreby it:

    I. Rejected Raiffeisen Bank's appeal as unfounded, upheld the Judgment of the Basic Court but amended the latter regarding the part of the legal interest by deciding that "the legal interest is ordered, as for the funds deposited in the commercial banks of Kosovo, for a period of over one year, without a specific destination, starting from the day of the judgment of the first instance court is issued until the final payment".

    II. Partially granted the appeal of Raiffeisen Bank and amended the Judgment of the Basic Court under point I of the enacting clause of this Judgment, obliging Raiffeisen Bank to pay to the Appellant *"for the non-material damage a compensation in the following amounts: the amount of €3,500.00 for physical pain, the amount of €3,200.00 for fear and the amount of €1,200.00 for bodily deformity, with a legal interest, as for funds deposited in the commercial banks of Kosovo, for a period over one year, without a specific destination, starting from the day of the Judgment of the first instance court is issued until the final payment, all this, within a period of 15 days, from the day of the receipt of this Judgment, otherwise through compulsory execution".*

III. Rejected as unfounded the statmetn of claim of the Applicant regarding the sums ordered under point II of the Judgment; and

IV. Point II of the enacting clause of the Judgment of the Basic Court "relating to the rejected part of the statement of claim of [the Applicant] remains unexamined".

20. Regarding the part established under point I of the enacting clause of this Court, the Court of Appeals assessed that the legal position of the Basic Court is fair and based on the law and that the same is neither involved in the essential violation of provisions of the contested from Article 182, paragraph. 2, points (b), (g), 0), (k) and (m) of the Law on Contested Procedure nor in the erroneous application of substantive law: "*except for the amended part, for which it was concluded that the first-instance court erroneously applied the substantive law, and that part of the enacting clause of the challenged judgment had therefore to be amended as well".*

21. The Court of Appeal, regarding the legal basis of the Applicant's statement of claim concluded that *"[…] just like it results from the case files, as well as the reasoning given in the challenged judgment, such a basis has been proved based on adequate evidence, specifically, by means of the occupational safety expertise of 19.07.2015, prepared by the expert [HN], which is found in the case files, and which is properly explained in the reasoning part of the challenged judgment, regarding the conclusion drawn on the objective liability to the extent of 70% of [Raiffeisen Bank] (according to Article 154, paragraphs 2 and 3 of LCT that was applicable at the time the occupational accident occurred). Such expertise was ordered by [the Basic Court] in accordance with the provisions of Article 356 (onwards) of LCP and its ascertainments were taken for granted by the Court at its discretion, which assessment, due to the lack of any evidence or other professional findings that would completely exclude the objective liability of [Raiffeisen Bank] for the incident that occurred, is found fair and legal by this second instance Court".*

22. Regarding the compensation amounts for physical pain, fear and bodily deformity "*The Court of Appeals partially granted Raiffeisen Bank's appeal as founded and consequently amended the amount ordered by the Basic Court, on grounds that "[…] the same has been assessed as very high to reach the goal of material satisfaction of the injured party".* According to the Court of Appeals, the Basic Court did not properly apply Article 200, paragraph 2 of LCT. In the context of the latter, the Court of Appeals assessed that *"the compensation must be adequate to the nature of the injury, the intensity and duration of the pain experienced, as well as the fear of the injured party, so that the compensation represents a relief in coping with and overcoming the consequences of the damage that in this case [the Applicant] suffered in the accident that occurred and that at the same time, they are real and present true satisfaction, as far as possible, in line with social for damage compensation goals".*

23. On 10 June 2020, Raiffeisen Bank submitted a revision to the Supreme Court against the Judgment of the Court of Appeals because of a violation of the provisions of contested procedures and erroneous application of substantive law.

24. Raiffesien Bank, through the revision submitted to the Supreme Court, alleged, inter alia, that "*The respondent Raiffeisen Bank J.5.C considers that the Judgment subject to this revision was issued in complete contradiction with the provisions of the Law on Contested Procedure and pursuant to Article 182.2 n) of LCP, which clearly defines that the violation the essential provisions of the contested procedure always exist: "if the decision has leaks due to which it' can't be examined, especially if the disposition of the decision is not understandable or contradictory in itself with the reasoning of the verdict, or when the verdict has no reason or which gives no justification for the final*

facts, or which reasoning is unclear, contradictory, or if in the final facts, there are contradictions between what is said in the verdict, the main document or the procedural records and of the document or the minutes of proceeding". Given that the Court in both instances described and dealt only with the evidence presented by the claimant while at the same time completely ignoring the facts and evidence presented by the respondent, the judgments have partial and contradictory contents with the content of the subject matter itself.

25. On 27 August 2020, the Applicant submitted a response to the revision submitted by Raiffeisen Bank, disputing the allegations presented in the revision, motioning the same to be rejected.

26. On 28 January 2021, the Basic Court by the Judgment [C. no. 409/2020] grated as founded the revision of Raiffeisen Bank and amended the judgments of the Court of Appeals and the Basic Court, rejecting the Applicant's statement of claim as unfounded.

27. The Supreme Court, through its Judgment, did not find as founded the legal position of the Basic Court and the Court of Appeals regarding approval of the Applicant's statement of claim due to the erroneous application of substantive law, namely Articles 173 and 174 in conjunction with Article 192, paragraph 1 of LCT.

28. In relation to its above-mentioned finding, the Supreme Court reasoned that:

> *"The Supreme Court found from the case files that the [Basic Court] and the [Court of Appeals], based on the evidence administered and established factual situation, have erroneously applied the substantive law, partially granting the statement of claim of [the Applicant], and obliging [Raiffeisen Bank] to compensate [the Applicant] for the damage [...].*
> *The erroneous assessment of the factual situation determined by [the Basic Court] and [the Court of Appeals] consists in the erroneous assessment of the evidence administered due to the fact that the [Basic Court] when partially granting the claim, and the [Court of Appeals] acting according to the appeal to establish the fact whether there is a liability and obligation of [Raiffeisen Bank] to compensate [the Applicant] for the damage sustained on 18.11.2011, where [the Applicant] while going down the external stairs of the Raiffeisen Bank building, Fushë Kosovë branch, slipped and fell and sustained bodily injuries, while at the time of the fall, she was performing her duties as a cashier in the District of Prishtina in Fushë Kosovë as an employee under regular employment relationship at the KEK Supply Division in Prishtina, based the Judgment on the opinion given by the occupational safety expert [HN], which expertise was not necessary in this case".*

29. The Supreme Court then considered that: "*The Supreme Court assesses that in the present case, the liability of [Raiffeisen Bank] has not been proven in relation to the injuries sustained by [the Applicant] due to the fact that in the case files there is no police report to describe the accident that occurred, or a municipal inspection report, which would give an overview of the facts that would be important for the accident, such as whether there was rain or frost on the critical day, and what was the condition of the stairs on which the accident occurred, and if the respondent had any omission that contributed to causing the accident, it was also not ensured that the evidence was obtained immediately after the accident occurred, while after the change in the factual situation, with the change in the state of the stairs, a fact which is not contested by the statements of the parties as in the case files, it is impossible to give an objective opinion from any expert regarding the circumstances of the accident, and in the specific case the proof of the respondent's liability for causing the damage. Even if we take into*

account the expertise of the occupational safety expert [HM], which is found in the case files, the opinion given by this expert is based on assumptions and not on the factual situation, since the expert himself stated in the written expertise and in the statement at the hearing that the tiles of the stairs were changed after the accident and at the same time he states that the respondent's liability stems from the fact that the stairs were slippery, although he did not give any reason as to how he came to such conclusion, which this Court cannot accept".

30. The Supreme Court further found that: *"[...] with the same evidence, the essential fact that the respondent is liable for causing the damage, which liability would also effectuate the obligation to compensate the damage, has not been proven, and the judgments of the two lower instances were therefore based on the provisions of Articles 173 and 174 in conjunction with Article 192, paragraph 1of Law on Contracts and Torts".*

31. The Supreme Court concluded that *"[...] from the evidence administered in this case and from the case files, it finds that the grounds of the claim of [the Applicant] have not been proven, and there is therefore no ground to grant claim due to the fact that based on of the evidence administered, the objective liability of [Raiffeisen Bank] in causing injuries of [the Applicant] injuries has not been proven. [...] based on Article 319, para. 1 of the Law on Contested Procedure, according to which, each party has the duty to prove the facts on which it grounds its claims and allegations, as well as Article 322 of LCP, according to which if the court, on the basis of the evidence obtained, cannot certainly prove a fact, the existence of the fact, it will end up applying the rules on the burden of proof, in this particular case the Court has rejected the Claimant's claim as in the enacting clause of this judgment, due to the lack the existence of evidence which would prove the validity of the rejected statement of claim of [the Applicant]".*

Applicant's allegations

32. The Applicant alleges that through the challenged Judgment of the Supreme Court, there has been a violation of her fundamental rights and freedoms guaranteed by Articles 3 [Equality Before the Law] and 24 [Equality Before the Law] of the Constitution, in conjunction with Article 14 (Prohibition of Discrimination) of the ECHR and Articles 1 and 2 of the International Convention on the Elimination of All Forms of Racial Discrimination, as well as Articles 31 [Right to Fair and Impartial Trial] and 54 [Judicial Protection of Rights] of the Constitution in conjunction with Articles 6 (Right to a fair trial) and 13 (Right to an effective remedy) of the ECHR.

33. The Applicant, referring to Article 214, paragraph 2 of LCP, states that the revision cannot be submitted due to erroneous or incomplete determination of the factual situation. In this context, the Applicant reasons that the Supreme Court *"grounds its challenged Judgment on the allegedly erroneous findings of the regular courts of the two instances, regarding the fact of incomplete determination of the factual situation, with the definite finding of whether or not there is a liability and obligation by the respondent to compensate [the Applicant] for the material damage and the non-material damage suffered in the accident on 18.11.2011".*

34. In relation to the decision of the Supreme Court through which the judgments of the Basic Court and the Court of Appeals were amended, the Applicant emphasizes the following: *"The Supreme Court by the challenged Judgment gives explanations that in the legal sense it doubts the passive legitimacy of the claimant in this civil dispute, then the question arises: what was the legal obstacle for the Supreme Court to GRANT the Revision as founded, AMEND the judgments of the instances of the regular courts and remanded the case to the first instance court for REVIEW and RECONSIDERATION,*

and thus give [the Applicant] the opportunity to take necessary actions to clarify the statement of claim, both in the subjective and the objective aspect".

35. The Applicant further alleges that the challenged Judgment of the Supreme Court was issued in *"contradiction with international conventions and the universal declaration of human rights, as well as anti-discrimination laws in the Republic of Kosovo".*

36. Furthermore, the Applicant states that Raiffeisen Bank has caused irreparable material and non-material damage to her.

37. Finally, the Applicant reiterates that *"she is convinced that the challenged Judgment contains in itself an elaboration and adjudication of the case related to the erroneous or incomplete determination of the factual situation, for which the REVISION is not allowed [...]".*

38. Furthermore, the Applicant alleges that *"the case of this Judgment represents a lack of legal certainty and a loss of confidence in the judiciary, and it would not be a good case law for a challenged Judgment to be further used as a source assisting regular courts to properly interpret the legal norm, the conduct of the judicial process and the qualification of the facts of each case in an adequate manner, with the aim of increasing credibility in the judiciary and legal security in general, as well as being valid as a recommendation that guides judges on the standards which will be guaranteed by the courts during the conduct of judicial processes of this and similar nature".*

39. Finally, the Applicant requests the Court to approve her Referral submitted to the Court.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 24
[Equality Before the Law]

"1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.

No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.

3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled."

Article 31
[Right to Fair and Impartial Trial]

"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law."

Article 54
[Judicial Protection of Rights]

"Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated."

European Convention on Human Rights

Article 6
(Right to a fair trial)

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."
[...]

Article 13
(Right to effective remedy)

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[...]

Law No. 03/L-006 ON CONTESTED PROCEDURE.

Article 182
(Untitled)

182.1 Basic violation of provisions of contested procedures exists in case when the court during the procedure didn't apply or wrong application of any of the provisions of this law, while this has or will impact a

rightful legal decision.
Basic violation of provisions of contested procedures exists always:
[...]
n)"if the decision has leaks due to which it' can't be examined, especially if the disposition of the decision is not understandable or contradictory in itself with the reasoning of the verdict, or when the verdict has no reason or which gives no justification for the final facts, or which reasoning are unclear, contradictory, or if in the final facts there are contradictions between what is said in the verdict, the main document or the procedural records and of the document or the minutes of proceeding".
[...]

CHAPTER XIV

EXTRAORDINARY MEANS OF STRIKE
REVISION

Article 211
(Untitled)

211.1 Against the decision of the court of second instance, sides can present a revision within a period of thirty (30) days from the day the decision was brought.
[...]

Article 212
(Untitled)

For revisions is decided by the Supreme Court of Kosovo.

[...]

Article 214
(Untitled)

214.1 Revision can be presented:
a) for violation of provisions of contested procedures from the article 188 of this law done by the procedure of the court of second instance;
b) due to wrongful application of material right;
c) due to over passing claim charge, if the irregularities were done in the procedure developed in the court of second instance.
214.2 Revision can be presented due to wrong ascertainment of incomplete of the factual state.
214.3 Against the decision issued in the procedures of the second instance, which verifies the decisions based on confession, the revision can be presented only by the causes mentioned in the paragraph 1, point.

a) and b) of the paragraph 2 of this article.
214.4 Against the decisions of the second instance which verifies the decision of the first instance, the revision is not permitted due to the violation of the provisions of the contested procedures from the paragraph

1, pt. 1, of this article, unless their existence is not mentioned in the appeal, except when it is dealt with the violation which are under the official task of the second instance court and the one of the revision.

[...]

Article 215
(Untitled)

The revision court examines the decision attacked only in the part that is attacked through revision and only within the boundaries of the causes shown by the revision, but taking care accordingly to the official obligation for rightful application of material goods right and for the violation of the provisions of the contested procedure, which deal with the ability to be a party and regular representation.

Article 224

224.1 If the court of revisions ascertains that the material good right was applied wrongfully, through a decision it approves the revision presented or changes the decision attacked.
224.2 If the court of revision ascertains due to the wrongful application of the material good, or due to the violation of rules of procedure-the factual state isn't certified completely and for that reason there are no conditions to change the attacked decision, then the court approves the revision through a verdict and annuls partially or completely the decision of the first and the second instance, or only the decision of the second instance, while the case is sent for retrial to the same or other judges of the court of the first instance or the second.

LAW ON OBLIGATIONAL RELATIONSHIPS
[PROMULGATED ON 30 MARCH 1978]

Sub-chapter 5
LIABILITY FOR DAMAGE FROM DANGEROUS OBJECT OR DANGEROUS ACTIVITIES
GENERAL PROVISIONS

Article 173
(Presumption of causality)

Injury or loss occurring in relation to a dangerous object of property or dangerous activity, shall be treated as originating from such object or activity, unless proven that these were not the cause of injury or loss.

Article 174
(Who is liable for injury or loss)

The owner of a dangerous object of property shall be liable for injury or loss caused by it while for injury or loss caused by a dangerous activity the person performing it shall be liable.
The owner shall be considered the possessor of the object, as well as the legal social person who has the right of disposal, respectively the right of temporary use.

[…]

II. SCOPE OF INDEMNITY FOR DAMAGE TO PROPERTY
[…]

Article 192
(Divided liability)

A person sustaining loss who has contributed to the occurrence of loss or to its becoming larger than otherwise, shall only be entitled to a proportionally reduced indemnity.
Should it be impossible to establish which part of damage comes from an act of the person sustaining it, the court shall award the indemnity while taking into account the circumstances of the case.

Assessment of the admissibility of the Referral

40. The Court first examines whether the Referral has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

41. In this regard, the Court refers to paragraph 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.*

42. The Court further refers to Article 47 [Individual Requests] and Article 48 [Accuracy of the Referral] and Article 49 [Deadlines] of the Law, which establish:

> Article 47
> [Individual Requests]
>
> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
> *2. The individual may submit the Referral concerned only after he/she has exhausted all the legal remedies provided by the law".*
>
> Article 48
> [Accuracy of the Referral]
>
> *In his/her Referral, the Applicant should accurately clarify what rights and freedoms he/she alleges to have been violated and what concrete act of public authority is subject to challenge.*
>
> Article 49
> [Deadlines]
>
> *The Referral should be submitted within a period of four (4) months. The deadline shall run from the day when the Applicant was served with the court decision. [...]*

43. Regarding the fulfillment of these requirements, the Court finds that the Applicant is an authorized party; she challenges the Judgment of the Supreme Court [Rev. no. 409/2020] of 28 September 2021; has specified the rights and freedoms that she alleges to have been violated; has exhausted all legal remedies defined by law, as well as submitted the Referral within the legal deadline.

44. The Court also finds that the Referral of the Applicant meets the admissibility criteria set forth in paragraph (1) of Rule 39 (Admissibility criteria) of the Rules of Procedure. The same cannot be declared inadmissible on the basis of the conditions defined in paragraph (3) of Rule 39 of the Rules of Procedure.

45. Moreover, and finally, the Court assesses that this Referral is not clearly unfounded as defined by paragraph (2) of Rule 39 of the Rules of Procedure, and it therefore should be declared admissible and its merits examined.

Merits of the Referral

46. The Court recalls that the circumstances of the specific case are related to the fact that the Applicant, employed as a cashier of the KEK division, Fushë Kosovë branch, on 18 November 2011, during her working hours, sustained physical injuries as a result of her fall on the stairs of Raiffeisen Bank building, Fushë Kosovë branch. On an unspecified date, the Applicant filed a claim against Raiffeisen Bank before the competent court, seeking compensation for bodily injury. On 4 January 2017, the Basic Court by the Judgment [C. no. 3134/11] partially granted the claim of the Applicant and obliging Raiffeisen Bank to pay her "for the injury sustained at the workplace to the extent of 70% of the liability" as compensation for the non-material damage the following amounts: 7,000.00 Euro as compensation for physical pain experienced; 8,400.00 Euro compensation for the fear inflicted; 2,450.00 Euro compensation for bodily deformity; and 3,500.00 Euro compensation due to the limitation of general life activity, and rejected the rest of her claim. As a result of Raiffeisen Bank's appeal submitted to the Court of Appeal, the latter by Judgment [Ac. no. 1034/17] of 24 February 2020 rejected the appeal as unfounded and upheld the Judgment of the Basic Court, but changed the latter only in the part referring to the legal interest part, deciding that: *"the legal interest is ordered, as for the funds deposited in the commercial banks of Kosovo, for a period of over one year, without a specific destination, starting from the day of the judgment of the first instance court is issued until the final payment".* As a result of the revision submitted by Raiffeisen Bank to the Supreme Court, the latter by the Judgment [Rev. no. 409/2020] granted as founded the revision of Raiffeisen Bank and amended the judgments of the Court of Appeals and the Basic Court, rejecting the Applicant's statement of claim as unfounded.

47. The Supreme Court by its Judgment: (i) did not find as founded the legal position of the Basic Court and the Court of Appeals regarding approval of the Applicant's statement of claim due to the erroneous application of substantive law, namely Articles 173 and 174 in conjunction with Article 192, paragraph 1 of LCT.; (ii) established that the erroneous assessment of the factual situation by the Basic Court and the Court of Appeal *"consists of the erroneous assessment of the evidence administered",* reasoning that the Applicant was performing her duties as a cashier of the KEK Division and that work expertise was not necessary; (iii) assessed that in the present case the liability of Raiffeisen Bank has not been proven in relation to the injuries sustained by the Applicant, reasoning that in the present case the relevant facts are missing; and (iv) as a result of this, the Court concluded that from the evidence administered in this case, and from the case files, the grounds of the Applicant's claim have not been proven.

48. The Applicant in her Referral to the Court states that: *"[...] the challenged Judgment contains in itself an elaboration and adjudication of the case related to the erroneous or incomplete determination of the factual situation, for which the REVISION is not allowed [...]".* In this context, the Applicant claims that the Supreme Court bases its reasoning for rejecting the statement of the claim on the determination of the factual situation by assessing whether the respondent [Raiffeisen Bank] is responsible for the damage caused. According to the Applicant, the Supreme Court in this case should have remadned to lower instance court. The Applicant further specifies that: "[...] *"the case of this Judgment represents a lack of legal certainty and a loss of confidence in the judiciary, and it would not be a good case law for a challenged Judgment to be further used as a source assisting regular courts to properly interpret the legal norm, conduct the judicial process and the qualify facts of each case in an adequate manner, with the*

aim of increasing credibility in the judiciary and legal certainity in general, as well as being valid as a recommendation that guides judges on the standards to be guaranteed by the courts during the conduct of judicial processes of this and similar nature".

49. From the aforementioned allegations of the Applicant, it follows that the allegations pointed out in her Referral are related to exceeding the jurisdiction of the Supreme Court to remand the case to the lower instance court for reconsideration, which claims are essentially related to the criterion of the right to a court established under law, guaranteed by paragraph 2 of Article 31 of the Constitution, in conjunction with paragraph 1 of Article 6 of the ECHR.

50. In the circumstances of the specific case, the Court will deal with the Applicant's allegations from the perspective of her right to a court established under law, as an integral part of the rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, also applying the principles established through the case law of the ECHR, in which case the Court in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to*: "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.*

51. The ECtHR has consistently highlighted that the principle of certainty requires that if the courts have decided on a case, their decision-making cannot be called into question (see, cases *Brumărescu vs Romania*, no. 28342/95, Judgment of 28 October 1999, paragraph 61 and *Guðmundur Andri Ástraðsson vs Iceland* [no. 26374/18, Judgment of 1 December 2020, paragraph 237).

52. In this aspect and in order to deal with the Applicant's allegations, the Court will elaborate on the general principles regarding the right to a tribunal established by law, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, as far as they are relevant in the circumstances of the present case, in order to assess the applicability of these articles to proceed with the application of these general principles in the circumstances of the present case.

I. Regarding the allegation of violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR

(i) General principles regarding the right to "a tribunal established by law" guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR as well as relevant case law

53. In the light of the foregoing and with the purpose of examining the Referral of the Applicant in terms of her right to a tribunal established by law, the Court initially refers to the general principles established through the ECtHR case law, according to which, in the light of the principle of the rule of law, inherent in the ECHR system, a tribunal must always be established by law (see the case of the ECHR *Guðmundur Andri Ástraðsson v. Iceland*, cited above, paragraph 211) or more precisely "a tribunal established in accordance with the law (paragraphs 229-230 in the case *Guðmundur Andri Ástraðsson v. Iceland*).

54. In relation to the above, the Court emphasizes the notion of "a tribunal established in accordance with the law". According to the ECtHR, "the law" based on which "a tribunal" is considered to be established includes any provision of the law.

55. In principle, the ECHR established that: *"a tribunal is characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner"* (see the ECHR case *Coëme and others v. Belgium*, no. 32492/96 and four others, Judgment of 22 June 2000, paragraph 99).

56. Hence, according to the ECtHR case law, "a Tribunal", according to the meaning of Article 6, paragraph 1 of the ECHR, means not only the legislation on the establishment and competencies of judicial bodies, but any provision of local legislation, which, if violated, would render the participation of one or more judges in the case examination irregular. In other words, the phrase *"established by law"* includes not only the legal basis for the very existence of "a tribunal" but also the observance by the court of the special rules on the basis of which it is governed (see the ECtHR case, *DMD Group, AS v. Slovakia*, no. 19334/03, Judgment of 5 October 2010, paragraph 59 and *Sokurenko and Strygun v. Ukraine*, nos. 29458/04 and 29465/04, Judgment of 20 July 2006, paragraph 24).

57. The ECHR, in principle, has emphasized that it is the local court that interprets the provisions of the local law in the first place and that their interpretation should not be questioned except in case of "flagrant violation" of the legislation (see the ECHR case, *Kontalexis v. Greece*, claim no. 59000/08, Judgment of 31 May 2011, paragraph 39).

58. According to the ECtHR case law, the Court notes that the allegations of the incompatibility with the right to "a tribunal established by law" have been examined and assessed in different contexts, both in the civil and criminal aspects of Article 6, paragraph 1 of the ECHR, including but not limited to the following:

(i) When a court has ruled outside its jurisdiction (see the case *Coëme and others v. Belgium*, cited above, paragraphs 107-109 and *Sokurenko and Strygun v. Ukraine*, cited above, paragraphs 26-28);
(ii) If a case is assigned or reassigned to a specific judge or court (see the case *DMD Group AS v. Slovakia*, cited above, paragraphs 62--72; CASE *Richert v. Poland*, cited above, paragraphs 41--57);
(iii) In the case a judge is replaced without providing the relevant justification as required by local law (see case *Kontalexis v. Greece*, cited above, paragraphs 42-44);
(iv) In the event of the tacit renewal of the judge's term for an indefinite period after the expiration of his/her mandate and pending his/her reappointment (see the case *Guroy v. Moldova*, Judgment of 11 October 2006, paragraph 37);
(v) In the event of a trial by a court whose members were disqualified from participating in the trial by law (see the case *Lavents v. Latvia*, cited above, paragraphs 114-115);
(vi) If a Judgment is issued by a panel of judges consisted of a smaller number of members than defined by law (see the case *Momčilović v. Serbia*, no. 23103/07, Judgment of 2 April 2019, paragraph 32).

59. The Court further points out that during the examination and assessment of the allegation of the Applicant substantially related to the right to a tribunal established by law, which at the case at stake it has to do with the Supreme Court's jurisdiction or obligation defined by law to remand the case to the lower instance court for retrial in the revision procedure, the court will apply the ECtHR principles established when a court exceeds its jurisdiction defined thereof by law.

60. Therefore, the Court will refer to the case *Sokurenko and Strygun v. Ukraine* which is related to the case when the courts have decided in compliance with their jurisdiction defined by law.

61. In the case *Sokurenko and Strygun v. Ukraine*, the circumstances of which were related to the fact that the Applicants claimed that the Supreme Court of Ukraine was not competent to confirm the decision of the Higher Commercial Court, since according to the Code of Commercial Procedure, this court may, after annulling the decisions of the Higher Commercial Court, remit the case for fresh consideration or cancel all proceedings. According to the ECtHR, there was no other provision extending the jurisdiction of the Supreme Court to render such a decision. The ECtHR further highlighted that in relation to these cases, the Supreme Court had not given any reason for making a decision, exceeding its jurisdiction, which resulted in a deliberate violation of the Code of Commercial Procedure and establishing a case law before the Supreme Court of Ukraine. Finally, the ECtHR found that as a result of the Supreme Court having exceeded the scope of its jurisdiction, clearly defined in the Code of Commercial Procedure, this court could not be considered a "tribunal established by law" pursuant to Article 6, paragraph 1 of the ECHR.

62. The Court also refers to cases *Veritas v. Ukraine,* no. 39157/02, Judgment of 13 November 2008; *Basalt Impeks, TOV v. Ukraine*, no. 39051/07, Judgment of 1 December 2011; and *AVIAKOMPANIYA ATI, ZAT v. Ukraine* no. 1006/07, Judgment of 5 October 2017 whereby it was assessed that the factual and legal circumstances were the same as those in the case *Sokurenko and Stuygun* and consequently it found that Article 6 of the ECHR was violated in both of these cases as a result of the violation of the right to a tribunal established by law.

(ii) Application of the above-mentioned principles to the Applicant's circumstances

63. The Court recalls that the Judgment of the Supreme Court challenged by the Applicant was issued in a contested procedure as a result of the revision submitted by Raiffeisen Bank against the Judgment of the Court of Appeals and that of the Basic Court. Through these last two judgments, Raiffeisen Bank was found to be 70% liable for causing the damage to the Applicant, and as a result, her claim for compensation for material damage was partially granted.

64. The Court also recalls that the Supreme Court, through its Judgment, quashed the judgments of the Court of Appeals and the Supreme Court, rejecting the Applicant's statement of claim for damage compensation. The Supreme Court found that the lower instance courts had erroneously applied the substantive law, assessing that the factual situation was erroneously applied and as a result of this finding, Raiffeisen Bank's liability for causing the damage could not be established.

65. The Court also recalls that in her Referral before the Court, the Applicant alleges that: (i) The Judgment of the Supreme Court entails an elaboration and adjudication of a case that is related to erroneous or incomplete determination of the factual situation, for which cases, according to her, the revision is not allowed and (ii) in this case, the Supreme Court should have sent the case back for retrial to the lower instance court and not decide on her claim.

66. As elaborated above, the Court reiterates that the subject matter of assessing the constitutionality of the challenged Judgment of the Supreme Court is the assessment of whether this Judgment was issued in compliance with the jurisdiction or obligation of the Supreme Court defined by Article 224 of LCP, which assessment is substantially related to the principle of a tribunal established by law, as one of the primary guarantees defined by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

67. To continue assessing the Applicant's allegation, the Court will elaborate on the legal basis, namely the provisions of the applicable law, which define the Supreme Court's jurisdiction to decide on the revision procedure.

Elaboration of the relevant legal provisions regarding the legal remedy-revision

68. The Court further refers to the relevant legal provisions on extraordinary legal remedy-revision and the jurisdiction of the Supreme Court to decide on the revision. Initially, the Court notes that paragraph 1 of Article 211 of the Law on Contested Procedure (hereinafter: LCP) stipulates that: *"Against the decision of the court of second instance, sides can present a revision within a period of thirty (30) days from the day the decision was brought"*. Whereas Article 212 specifies that the Supreme Court decides on the revision.

69. The Court further notes that paragraph 1 of Article 214 defines the grounds for which a revision can be filed to the Supreme Court, respectively it is determined that the revision can be submitted:

> *a) for violation of provisions of contested procedures from article 188 of this law done by the procedure of the court of second instance;*
> *b) due to wrongful application of material right;*
> *c) due to over passing claim charge, if the irregularities were done in the procedure developed in the court of second instance.*

70. Whereas the Court notes that paragraph 2 of Article 214 stipulates that: *"Revision can be presented due to wrong ascertainment of incomplete of the factual state"*.

71. The Court further highlights Article 224 of LCP. Paragraph 1 of this Article stipulates that; *"If the court of revisions ascertains that the material good right was applied wrongfully, through a decision it approves the revision presented or changes the decision attacked"*. While paragraph 2 of article 224 stipulates that: *"If the court of revision ascertains due to the wrongful application of the material good, or due to the violation of rules of procedure-the factual state isn't certified completely and for that reason there are no conditions to change the attacked decision, than the court approves the revision through a verdict and annuls partially or completely the decision of the first and the second instance, or only the decision of the second instance, while the case is sent for retrial to the same or other judges of the court of the first instance or the second"*.

Court's assessment

72. The Court initially points out that the extraordinary legal remedy, namely the revision in the circumstances of the case at stake was allowed and that the Supreme Court examined and decided in accordance with its jurisdiction defined by Articles 211 and 212 of LCP.

73. However, the Court will, based on the general principles and the relevant legal provisions specifically related to the jurisdiction of the Supreme Court to decide in the revision procedure, assess whether the challenged Judgment violated the Applicant's right to "a tribunal established by law" or "a tribunal established in accordance with the law" as one of the essential principles or criteria of the right to a fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

74. Therefore, the Court will examine and assess whether the Supreme Court, during its decision-making in the revision procedure, has ruled in compliance with or has exceeded its jurisdiction defined by law, namely paragraph 2 of Article 224 of LCP. This Court's

assessment will be based on the principles established through the ECtHR case law, more specifically in the course of assessing the Referral, the Court will ground its decision on the ECtHR principles and findings in the relevant case law related to cases where a court, by exceeding its jurisdiction defined by the law, has violated the criterion of a tribunal established by law pursuant to Article 6 of the ECHR.

75. The Court recalls that Article 31, paragraph 2 of the Constitution stipulates that: *2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law."*

76. Whereas paragraph 1 of Article 6 stipulates that: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]"*

77. In principle, the Court points out that the issue of whether the Supreme Court has exceeded its jurisdiction defined by law by quashing the judgments of the lower instance courts and rejecting the Applicant's claim raises issues of the principle of legal certainty, as one of the main rule of law components in a democratic society.

78. As mentioned above, the Court reiterates that when assessing whether the Supreme Court exceeded its jurisdiction defined by law, it will refer to the relevant ECtHR case law, more specifically the case *Sokurenko and Strygun v. Ukraine*, through which it was considered that the phrase "established by law" covers not only the legal basis for the very existence of "a tribunal", but also its decision-making in compliance with the special rules governing it (paragraph 24 of the Judgment in the case *Sokurenko and Strygun v. Ukraine*).

79. In terms of the applicable law in the present case, the Court reiterates that the issue of the Court's jurisdiction to decide on the revision is defined by the provisions of LCP, namely Articles 211 to 224 of this law. More specifically, these legal provisions stipulate the legal basis for the very existence or jurisdiction of the Supreme Court to decide on the revision procedure. Up to this stage, or in relation to the Court's jurisdiction to decide pursuant to Articles 212 to 224, the Court notes that the Supreme Court had jurisdiction to decide in the revision procedure. The Court further notes that the revision was filed by the respondent due to the violations of the provisions of the contested procedure and the erroneous application of substantive law.

80. The respondent [Raiffeisen Bank] specified in its revision that: *"[...] she considers that the Judgment challenged through this revision was issued in complete contradiction with the provisions of the Law on Contested Procedure, namely Article 182.2 n) of LCP, which clearly stipulates that the fundamental violation of the provisions of contested procedure always exists: "If the decision has leaks due to which it' can't be examined, especially if the disposition of the decision is not understandable or contradictory in itself with the reasoning of the verdict, or when the verdict has no reason or which gives no justification for the final facts, or which reasoning are unclear, contradictory, or if in the final facts there are contradictions between what is said in the verdict, the main document or the procedural records and of the document or the minutes of proceeding." Given that, in both instances, the Court has only described and dealt with the evidence presented by the claimant, while at the same time completely ignoring the facts and evidence presented by the respondent, the judgments have a partial and contradictory content with the content of the subject matter itself".*

81. Regardless of this fact, the Court assesses that in terms of the criterion defined by paragraph 2 of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR that a tribunal must be established by law, the Court assesses that the courts in general, and in the case at stake the Supreme Court, must adhere to their jurisdiction expressly defined by law, in the case at stake, the provisions of LCP in the course of decision-making and reasoning. This is because the right to a tribunal established by law or in accordance with the law is a central feature of a fair and impartial trial as it refers to the very essence of the right, and consequently the Court considers that the assessment and consideration of whether the Supreme Court has exceeded its legal jurisdiction during the decision-making in this revision procedure, is essential and primary before establishing whether the other procedural guarantees defined in Article 31 of the Constitution, in conjunction with Article 6 of ECHR have been complied with or not.

82. In the light of the foregoing, the Court recalls the reasoning given by the Supreme Court underlining that: (i) The Basic Court and the Court of Appeals grounded the partial approval of the Applicant's claim on the expertise of the occupational safety expert, which according to them was unnecessary and that his opinion was *"based on assumptions and not on the factual situation": (ii) "[...] that in this particular case the liability of [Raiffeisen Bank] has not been proven in relation to the injuries sustained by [the Applicant] due to the fact that in the case files there is no police report to describe the accident that occurred, or a municipal inspection report, which would give an overview of the facts that would be important for the accident, such as whether there was rain, frost on the critical day, and what was the condition of the stairs in which the accident occurred, and if the respondent had any omission that contributed to causing the accident, it was also not ensured to collect the evidence immediately after the accident occurred, while due to the change in the factual situation by changing the state of the stairs which is fact that is not disputed by the statements of the parties as in the case files, it is impossible to give an objective opinion from any expert regarding the circumstances of the accident, and also establish the respondent's liability in causing the damage in this particular case.[...]";* (iii) based on the evidence administered by the Basic Court, the Raiffeisen Bank's liability for causing the damage to the Applicant was not proven, and consequently, Articles 173 and 174 were erroneously applied in conjunction with paragraph 1 of Article 192 of LCP; and (iv) since the Raiffeisen Bank's liability was not proven based on the administered evidence, and the grounds for the Applicant's claim have not been proven either.

83. The Court notes that as a result of the above-mentioned findings, from the reasoning given by the Supreme Court, it follows that the respondent's liability in the case at stake was not proven, the Supreme Court had rejected the Applicant's claim as unfounded, and consequently quashed the decisions issued by the Basic Court and the Court of Appeals by rejecting the Applicant's claim in its entirety.

84. The Court further points out that the Supreme Court, prior to its reasoning, had assessed that: *"from the case files it found that the first instance court and the second instance court, based on the administered evidence on the established factual situation, erroneously applied the substantive law, partially granting the claim of [the Applicant] and obliging the respondent [Raiffeisen Bank] to compensate [the Applicant] for the damage in detail as in the enacting clause of the first and second instance judgment".*

85. In relation to the latter, the Court refers to paragraph 2 of Article 224 of LCP, which stipulates that if the Supreme Court finds that *"due to the erronous application of the material good, or due to the violation of rules of procedure-the factual state isn't certified completely and for that reason there are no conditions to change the attacked decision, than the court approves the revision through a verdict and annuls partially or completely the decision of the first and the second instance, or only the decision of*

the second instance, while the case is sent for retrial to the same or other judges of the court of the first instance or the second".

86. In this regard, the Court recalls the aforementioned ECtHR case of *Sokurenko v. Ukraine,* through which it assessed that: *"in the instant case, the Court notes that under Article 111-18 of the Code of Commercial Procedure the Supreme Court, having quashed the resolution of the Higher Commercial Court, could either have remitted the case for a fresh consideration by the lower court or nullified the proceedings [...]. Instead it upheld the decision of the Court of Appeal and such course of action was not provided for under the Code of Commercial Procedure, as the Government admitted in their observations [...]. The Court [ECtHR] further notes that there was no other provision extending the Supreme Court's competence to this type of decision. [...] (*see paragraph 26 of the Judgment in the case *Sokurenko v. Ukraine).*

87. Also, even in the Applicant's case, the Court does not note that the Supreme Court has given any concrete justification as to why it was impossible to remand the case for reconsideration or hear the litigants regarding the findings of this Court in the lower instance courts according to this Court.

88. Therefore, pursuant to paragraph 2 of Article 224 of LCP, the Court finds that the Supreme Court should have remanded the case for reconsideration to the same or other judges of the Basic Court or the Court of Appeals.

89. Consequently, in terms of the guarantees defined by paragraph 2 of Article 31 of the Constitution, in conjunction with Article 6 of ECHR, which guarantees are also related to the principle of legal certainty and the genuine administration of justice, the Court considers that based on the exceeding of the jurisdiction defined by paragraph 2 of Article 224 of LCP by Supreme Court by rejecting the Applicant's claim without giving her an opportunity to present her arguments and facts regarding the Supreme Court's findings referring to the determination of the factual situation, she has been denied access to justice. Remanding the case for reconsideration would, moreover, enable the litigants, and in particular the Applicant, to have the opportunity to present their submissions and arguments regarding the case in accordance with the adversary principles, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of ECHR

90. It therefore results that the Court does not prejudge the merits or the result of the examination of the Applicant's claim in terms of proving the factual situation and the application of substantive law by the regular courts and the Supreme Court.

91. Furthermore, the Court reiterates that the Supreme Court had jurisdiction to decide on the revision submitted by the respondent. However, pursuant to paragraph 2 of Article 224 of LCP, which provision refers to the jurisdiction of the Supreme Court in the context of its decision-making, the Court considers that based on the Supreme Court's finding that as a result of the erroneous application of substantive, law the factual situation was erroneously established, the latter had to remit the case for reconsideration to the lower instance courts.

92. Consequently, pursuant to Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, the Court considers that by exceeding its jurisdiction defined by law, namely its jurisdiction defined by paragraph 2 of Article 224 of LCP, the Supreme Court cannot be considered as a tribunal established by law during its decision-making in the revision procedure in this case.

93. Therefore, the Court finds that the challenged Judgment [Rev. no. 409/2020] of the Supreme Court of 28 September 2021 constitutes a violation of Article 31 of the Constitution, in conjunction with Article 6 of ECHR.

II. Regarding the allegations of violation of Articles 3 and 24 of the Constitution, in conjunction with Articles 1 and 2 of the International Convention on Elimination of All Forms of Racial Discrimination and Article 54 of the Constitution and Article 13 of the ECHR

94. The Court, as a result of its finding of a violation of the principle of a tribunal established by law, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, finds that it will not continue with the separate examination of the Applicant's allegations for violation of Articles 3 and 24 of the Constitution, in conjunction with Articles 1 and 2 of the International Convention on Elimination of All Forms of Racial Discrimination and Article 54 of the Constitution and Article 13 of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20, 27 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in the session held on 23 February 2023, with a majority of votes:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that Judgment [Rev. no. 409/2017] of the Supreme Court of 28 August 2017 is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 [[Right to a fair trial]] of the ECHR.

III. The DECLARE Judgment [Rev. no. 409/2020] of the Supreme Court of Kosovo of 28 September 2021 invalid.

IV. TO REMAND the Judgment [Rev. no. 409/2020] of the Supreme Court of Kosovo of 28 September 2021 for reconsideration, in accordance with the Judgment of this Court;

V. TO ORDER the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 23 August 2023, of the measures taken to implement the Judgment of this Court;

VI. TO REMAIN seized of the matter pending compliance with this order;

VII. TO NOTIFY this Judgment to the parties, and in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VIII. This Judgment shall take immediate effect.

Judge Rapporteur **President of the Constitutional Court**

Selvete Gërxhaliu-Krasniqi Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.